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In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF CALIFORNIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the Temporary Emergency Court of Appeals of the United States in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-16a) is not yet reported. The order of the district court (App. E, *infra*, pp. 27a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 17a) was entered on September 19, 1974.

On November 12, 1974, the court denied a petition for rehearing and suggestion for rehearing *en banc* (App. C, *infra*, pp. 18a-20a). The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended by Pub.L. 92-210, 85 Stat. 743, and Pub.L. 93-28, 87 Stat. 27.

QUESTION PRESENTED

Whether, after the Economic Stabilization Act of 1970 has expired, the courts may enjoin the retroactive payment of additional wages for work performed while the Act was in effect, the payment of which both the Act and an order of the Cost of Living Council had prohibited.

STATUTES INVOLVED

The Economic Stabilization Act of 1970, 84 Stat. 799, as amended by Pub.L. 92-210, 85 Stat. 743, and Pub.L. 93-28, 87 Stat. 27, provides, in pertinent part:

> Section 202. Findings
>
> It is hereby determined that in order to stabilize the economy, reduce inflation, minimize unemployment, improve the Nation's competitive position in world trade, and protect the purchasing power of the dollar, it is necessary to stabilize * * * wages [and] salaries * * *. The adjustments necessary to carry out this program require prompt judgments and actions by the executive branch of the Government. The Presi-

dent is in a position to implement promptly and effectively the program authorized by this title.

Section 203. Presidential authority

(a) The President is authorized to issue such orders and regulations as he deems appropriate, * * * to—

(1) stabilize * * * wages, and salaries at levels not less than those prevailing on May 25, 1970, * * *;

* * * *

(b) In carrying out the authority vested in him by subsection (a), the President shall issue standards to serve as a guide for determining levels of wages [and] salaries, * * * which are consistent with the purposes of this title and orderly economic growth. * * *

Section 209. Injunctions and other relief

Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order

restitution of moneys received in violation of any such order or regulation.

Section 218. Expiration

The authority to issue and enforce orders and regulations under this title expires at midnight April 30, 1974, but such expiration shall not affect any action or pending proceeding, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to May 1, 1974.

The General Savings Statute, as amended, 1 U.S.C. 109, provides in pertinent part:

Section 109. Repeal of statutes as affecting existing liabilities

* * * The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

STATEMENT

On July 1, 1973 the California State Budget Act (Calif. Statutes 1973, ch. 129) became effective, providing for wage increases for approximately 180,000 California state employees. The increases ranged from 6.8 to 11.3 percent. Since they exceeded the 5.5 percent increase per annum established by the Cost of Living Council ("Council") as the general wage

and salary pay standard (6 C.F.R. 130.12), the Council initiated administrative review procedures. By order of August 29, 1973, the Council granted the full 6.8 percent increase for certain academic employees, but limited the increases for other state employees to 7 percent.[1] Respondents sought administrative reconsideration of this order, and on February 1, 1974, the Council affirmed its August 29 ruling.

Meanwhile, however, respondents had taken three actions: California sought review of the August 29 order in the United States District Court for the Eastern District of California (Case No. 74-17). The California State Employees Association sued the State in the state Supreme Court to compel payment of the disputed increases. In addition, to prevent the funds appropriated to pay the disallowed increases from reverting to the State's general and special funds, on October 2, 1973, the California legislature established an escrow fund in which the monies were to be held pending reappropriation (Calif. Statutes 1973, ch. 1136).

In the district court action, which is pending, the United States has moved for summary judgment, and counterclaimed for an injunction to prevent the payment of the increases authorized by the 1973 Budget Act.[2]

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[1] We are lodging a copy of this order with the Clerk of this Court. The order authorized the limited increases for the period July 1, 1973 to June 30, 1974, but on April 30, 1974 the Stabilization Act expired. Wages for work performed thereafter were not subject to controls.

[2] The counterclaim was filed on August 2, 1974. District court case 74-17 is the subject of a pending interlocutory

The state employees were successful in their state action.[3] On April 19, 1974, the California Supreme Court concluded that the Economic Stabilization Act did not apply to state employees, and ordered California to pay the disputed increases (*Coan* v. *State*, 520 P.2d 1003).[4]

On April 30, 1974, the Economic Stabilization Act expired. Despite the pendency of the district court review proceeding, California stated that it would immediately pay the disputed increases.

The United States thereupon instituted this suit in the United States District Court for the Eastern

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appeal to the Temporary Emergency Court of Appeals (Case No. 9-19) from the district court's denial of the request by the United States to file an amended counterclaim. The amended counterclaim seeks to enjoin the lump-sum retroactive payment of the escrowed funds pursuant to a new Act of the California legislature, which became effective on August 30, 1974 (Calif. Statutes 1974, Assembly Bill No. 4428).

Pending the outcome of that appeal, the Temporary Emergency Court of Appeals has enjoined California from making the retroactive lump-sum payment under the 1974 law.

[3] The United States appeared as *amicus curiae* in that suit challenging the jurisdiction of the court, since Section 211(a) of the Economic Stabilization Act gives exclusive original jurisdiction over matters arising under the Act to the federal district courts. Since the United States was not permitted to intervene, it could not remove the case to the federal district court.

[4] The California court expressly disagreed with the conclusion of the Temporary Emergency Court of Appeals in *United States* v. *State of Ohio*, 487 F.2d 936, certiorari granted *sub nom. Fry* v. *United States*, 415 U.S. 912, argued November 11, 1974, that the Act does apply to state employees (520 P.2d at 1010).

District of California to enjoin such payment.[5] The district court issued a preliminary injunction (App. E, *infra*, pp. 27a-28a). It prohibited payment of the increases provided by the 1973 Budget Act that exceeded the amounts authorized by the Council until the final disposition of the review proceeding (No. 74-17) and *Fry* v. *United States*, *supra*.

The Temporary Emergency Court of Appeals reversed, holding that the district court was without jurisdiction to issue the injunction. The court of appeals ruled that since the State had not paid the disputed increases before the expiration of the Stabilization Act, there was no violation committed before expiration; it also ruled that there was no enforcement proceeding pending on the date the act expired. It therefore concluded that the action was not within the savings provision of the Act, which the court construed as limited to those two situations. The court also rejected the government's contention that the action was saved by 1 U.S.C. 109.

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the power of the federal courts to prevent the retroactive payment of additional wages, the payment of which had been prohibited while the Economic Stabilization Act of 1970 was in effect. The decision of the Temporary Emergency Court of Appeals that the courts cannot enjoin such payments

[5] The State employees intervened.

will significantly undercut the achievements of the Economic Stabilization Act and add substantially to current inflationary pressures.

1. The August 29, 1973 Council order limits the salaries which may be paid to any California state employee for work performed between July 1, 1973 and April 30, 1974 to 7 percent more than the employee previously received. Although this order has not been modified, the State now intends to pay its employees, for work in the barred 10 months, the increases that the Council order prohibited. The holding of the Temporary Emergency Court of Appeals that the district court had no jurisdiction to enjoin such payments because they were not made during the controlled period will encourage others to challenge the many limitations on wage increases that the Council imposed.

Orders of the Council and its related agencies [6] did not require the modification of the agreements or contracts reviewed; instead, they simply barred the payments called for in the agreements in excess of the levels allowed. The decision below in effect removes that bar, and permits the subsequent recovery of the full contract amounts.[7] In addition, the poten-

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[6] Primarily the Pay Board, the Price Commission, and the Construction Industry Stabilization Committee.

[7] Wage and salary increases of hundreds of millions of dollars, scheduled under more than ten thousand collective bargaining agreements, were reduced by decisions of the Council, the Pay Board, and the Construction Industry Stabilization Committee. A substantial number of these agreements—par-

tial availability of such payments can be expected to encourage demands for higher wages in new agreements to compensate for not bringing such actions.[8]

Moreover, those who voluntarily complied with the applicable guidelines, or who are otherwise unable to press claims for retroactive wage increases, will be arbitrarily disadvantaged.[9] Perhaps more importantly, there will be a windfall advantage to those employees who can compel retroactive payments.

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ticularly in the construction industry—expressly provide for retroactive payments of disallowed increases whenever such payments are lawful.

In hundreds of cases, involving millions of dollars, limitations were imposed on the amounts health care providers could receive as reimbursements from third party payors, such as Blue Cross and Medicare. Since such reimbursements are typically made retroactively under long term contracts, past efforts to combat inflation in health care will be substantially nullified if health care providers can now claim the barred payments.

An unknown number of leases call for rents in excess of amounts allowed under Council regulations and decisions. Under the decision below, lessors could presumably now obtain retroactive payment of the entire lease amount for the controlled period.

[8] In *Transcontinental Gas Pipe Line Corp.* v. *Dep't of the Treasury*, Civ. No. 74-1389 D.D.C. 1974, a utility whose proposed rate was reduced to comply with the Act relies on the decision below in claiming that current rate increases should be added not to the rate actually charged, but to the rate which would have been charged but for the reduction.

[9] For example, contractors who have completed cost-plus contracts, employees of defunct businesses, or those who worked without a contract.

These windfalls will tend to destabilize wage relationships within industries and among employees in related industries in a geographic area. Destabilization will lead to further demands for salary increases and labor unrest.

2. These erratic unraveling effects were not contemplated by Congress, nor are they consistent with the contemporaneous administrative interpretation of the Act. There is no indication that, in enacting the Act, Congress simply intended to defer the effects of inflation from August 15, 1970 to May 1, 1974, and then to permit the retroactive payment of the inflationary sums earned in that period. See *United States* v. *International Brotherhood of Electrical Workers, Local No. 11*, 475 F.2d 1204, 1208-1209 (T.E.C.A.).[10]

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[10] In Executive Order 11788, 39 Fed. Reg. 22113 (June 20, 1974), the Secretary of the Treasury was delegated the authority to continue enforcement procedures under the Act "with respect to work performed prior to May 1, 1974 * * *." Section 3, Executive Order 11788.

The Executive Order calls for administrative and judicial action after April 30, 1974 to enforce controls applicable to work performed and goods provided before that time. In response to this interpretation by the President, the Congress appropriated $2 million to carry out the Executive Order. Pub.L. 93-381 (88 Stat. 613) enacted on August 21, 1974. See 120 Cong. Rec. H8177-H8187 (daily ed., Aug. 13, 1974); 120 Cong. Rec. S15021-S15030 (daily ed., Aug. 15, 1974).

This Court stated in *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 116:

> Such construction by the Chief Executive, being both contemporaneous and consistent, is entitled to great weight. * * * And the appropriation by Congress of funds

The Temporary Emergency Court of Appeals concluded that this anomalous result was required by the Act's savings clause, Section 218. We submit that Section 218 instead indicates only that the Act will not control prices charged for goods and services provided or wages paid for work performed after April 30, 1974. Any doubt on that score is dispelled by the General Savings Statute, 1 U.S.C. 109, which the court mentioned only in passing (App. A, *infra*, pp. 8a-9a).

Section 218 provides that:

> The authority to issue and enforce orders and regulations under this title expires at midnight April 30, 1974, but such expiration shall not affect any action or pending proceeding, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to May 1, 1974.

Thus, Congress has preserved the integrity of controls over the amounts paid for goods and services during the controlled period by explicitly preserving the right to enforce orders based on acts committed before May 1. Actions to enforce such controls will necessarily involve "acts" committed before May 1.

In this case, not only was the work for which the payments were to be made performed during that time, but in addition the State enacted the law granting the increases, the Council reviewed the increases

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for the use of such agencies stands as confirmation and ratification of the action of the Chief Executive. * * * [Citations omitted.]

and issued an order limiting them, and respondents sought administrative and judicial review of the Council order. All these events constituted the "acts" upon which the suit was based (App. E, *infra*, p. 25a). They were sufficient to bring this suit within the exception to Section 218.

The Court of Appeals, however, concluded that the reference in Section 218 to any "*act* committed prior to May 1" meant only any *violation* so committed.[11] But if Congress had intended that only acts which constituted offenses would provide continuing jurisdiction, it would have said so. The savings clause in the Emergency Price Control Act of 1942 specifically saved actions based on "offenses committed, or rights or liabilities incurred" prior to its termination date (56 Stat. 23, 24). In the Economic Stabilization Act of 1970, Congress achieved the same overall effect by omitting the reference to rights and liabilities, and

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[11] Even under that interpretation, the placing of the disputed funds in an escrow account for payment after the expiration of controls constituted a violation of the Act before May 1, 1974. *United States* v. *International Brotherhood of Electrical Workers, Local No. 11*, 475 F.2d 1204 (T.E.C.A.); 6 C.F.R. 201.41; 6 C.F.R. 152.151. The fact that the *Local 11* case arose under Phase II, and the California escrow fund was established during Phase IV is not significant, since under Phase IV California was not permitted to "[p]ay * * * directly or indirectly, immediately or on a deferred basis, any wage or salary increase * * * that is * * * in excess of an increase approved in a decision and order of the Council." 6 C.F.R. 152.151(a)(2), 38 Fed. Reg. 23625, August 31, 1973. The rationale of *Local 11* establishes that the creation of the escrow fund constituted a prohibited indirect payment on a deferred basis.

referring broadly to acts committed before the termination date. Thus any such act, whether it is an offense or an act giving rise to rights and liabilities, provides continuing jurisdiction to the courts to bar payments that could not have been made while the Act was in effect.[12]

The Court of Appeals concluded that Section 218 continues the effectiveness only of pending enforcement proceedings.[13] But there is no reason to read the Section 218 reference to "any action or pending proceeding, civil or criminal" as limited to enforce-

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[12] In addition, the pending proceeding exception to Section 218 applies in this case, since otherwise the expiration of the Act will "affect [a] * * * pending proceeding." Unless enjoined, California intends to pay the disputed increases. That payment will surely affect the pending civil review proceeding in the federal district court; once the increases are paid, the issue of the validity of the Council order is of little importance. This injunction suit is therefore supplementary to and protective of the jurisdiction of the civil review proceeding which was pending before May 1, 1974. The fact that procedurally the injunction was sought in a separate suit, rather than in the pending proceeding, should not be controlling where the whole purpose of the subsequent suit was to preserve the questions raised in the pending proceeding.

[13] The court also concluded that, even if the statute is not so limited, the proceeding which culminated in the August 29 order was no longer pending, and thus could not serve as a basis for jurisdiction under Section 218. But although the August 29 order became the final agency action when it was affirmed on February 1, 1974, the order was under review in the federal district court on April 30, 1974. Since that court could remand the matter to the Council's successor agency for reconsideration, the proceeding was still pending; see *City of New York* v. *New York Telephone Co.*, 468 F.2d 1401, 1404 (T.E.C.A.); Executive Order 11788, *supra*, n. 10.

ment proceedings.[14] Indeed, there would be little purpose in saving pending enforcement actions if, even when the suit results in an order to restore the excess monies received, the recipient could immediately compel their payment retroactively by suit on the agreement.[15]

Nor is it likely that Section 218 was intended to give greater effect to an order which was still under review in a proceeding pending when the stabilization authority expired, than to one which had become final. This is confirmed by the General Savings Statute, 1 U.S.C. 109, which provides:

> * * * The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or pros-

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[14] The court below reached this result by relying on cases interpreting the different language of the Emergency Price Control Act of 1942 (56 Stat. 23); *e.g.*, *Talbot* v. *Woods*, 164 F.2d 493 (Em. C.A.). Section 218, however, provides that although the authority to "*issue* and enforce orders and regulations under this title expires * * * *such* expiration shall not affect *any* action or pending proceeding, civil or criminal, not finally determined * * *." (Emphasis added.) By its terms, it thus saves both pending proceedings relating to the review of issued orders and enforcement proceedings.

[15] Even if civil fines or criminal penalties were involved in such suits, there would be no reason to continue the suits after the statute expired, since the penalties are considered tools to enforce compliance, rather than goals in themselves.

ecution for the enforcement of such penalty, forfeiture, or liability.

The August 29 Council order has not been modified. Therefore, it continues to control the rights and duties of the State and its employees. Cf. *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U.S. 4. The order specifically states (at p. 5) that any "wage and salary increase not authorized by this Decision and Order for the control year ending June 30, 1974 shall not be put into effect without the prior approval of the Cost of Living Council." Although the expiration of the Stabilization Act terminated the control year on April 30, rather than June 30, it did not relieve California of its continuing obligation not to pay unauthorized salary increases for work performed in the control year.

The major purpose of the General Savings Statute is to prevent—in the absence of a deliberate legislative directive—the expiration of a statute from acting as a legislative pardon for liabilities imposed by it.[16] This provision extends to liabilities created by regulations issued pursuant to the statute. *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 119.

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[16] The savings statute is to be incorporated in, and enforced as part of, a repealing statute unless otherwise expressly provided in the repealing statute. Section 218 of the Stabilization Act neither impliedly nor expressly provides that 1 U.S.C. 109 shall not apply; although Section 218 is somewhat duplicative of and complementary to 1 U.S.C. 109, it is in no way inconsistent with it. Accordingly, the Economic Stabilization Act must be read as incorporating 1 U.S.C. 109.

The savings statute preserves not only remedies but also the means necessary to ascertain and impose the remedy, *i.e.*, the jurisdiction of the courts to enforce the Economic Stabilization Act. *De La Rama S.S. Co.* v. *United States*, 344 U.S. 386, 389. It also permits administrative enforcement by a successor agency. *Fleming* v. *Mohawk*, *supra*, 331 U.S. at 113-119.

The August 29 order imposes on the State an obligation not to pay wages for work performed during the Economic Stabilization Act controls period in excess of the amounts permitted by the order. That obligation is, in effect, a liability incurred under the Act. Therefore, 1 U.S.C. 109, which directs that the Stabilization Act is to be "treated as still remaining in force for the purpose of sustaining any proper action * * * for the enforcement of such * * * liability," continues the Economic Stabilization Act in force to enable the courts to enjoin payments that violate the limits it imposed.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
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CARLA A. HILLS,
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HARRIET S. SHAPIRO,
Assistant to the Solicitor General.

WILLIAM C. WHITE,
Attorney.

DECEMBER 1974.

APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Nos. 9-13 and 9-14

[Filed September 19, 1974]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THE STATE OF CALIFORNIA, ET AL., DEFENDANTS-APPELLANTS

and

JAMES COAN AND THE CALIFORNIA STATE EMPLOYEES' ASSOCIATION, INTERVENORS-APPELLANTS

Talmadge R. Jones, Deputy Attorney General, State of California, Sacramentc, California (Evelle · J. Younger, Attorney General and Willard A. Shank, Assistant Attorney General, State of California, with him on the brief) for the Appellants.

Loren E. McMaster, California State Employees' Association, Sacramento, California for the Intervenors-Appellants.

William C. White, Department of Justice, Washington, D. C., (Carla A. Hills, Assistant Attorney General, Department of Justice, Washington, D. C., with him on the brief) for the Appellees.

Before CARTER, CHRISTENSEN, and ESTES, Judges.

ESTES, Judge.

This is an appeal under Section 211 of the Economic Stabilization Act of 1970, as amended (the Act), by defendants from an order of the United States District Court for the Eastern District of California granting plaintiff, the United States of America, a preliminary injunction forbidding defendant California to pay wage and salary increases which were disallowed by order of the Cost of Living Council (CLC) issued August 29, 1973 during the existence of the Economic Stabilization Program.[1]

On June 30, 1973 the Governor of the State of California signed into law the California State Budget Act of 1973,[2] which was to become effective on July 1, 1973. This legislation provided for pay increases varying from 6.8 to 11.3 percent for various state employees for the period of July 1973 through June 1974. The CLC challenged the amount of the increases and, after receiving submissions from the parties and holding a hearing, on August 29, 1973 issued its decision and order allowing the 6.8 percent increases but limiting the other increases to seven percent. A formal request for review was

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[1] During the times material to the matters in controversy, the largely voluntary wage controls of Phases III and IV, which had been initiated by Executive Order No. 11695 of January 11, 1973, were in effect. The mandatory Phase II general standards as to permissible wage or price increases served thereafter merely as flexible general guidelines. For legislative history describing these phases, see S. Rep. 93-63, in U. S. Code Congressional and Administrative News, 93d Cong., 1st Sess., at 1299-1326.

[2] California Statutes 1973, ch. 129.

filed by defendant State of California and denied by the CLC on February 1, 1974. Throughout these proceedings California and its officials have refrained from paying out the disallowed portions of the legislated increases.[3]

On July 12, 1973 defendants-intervenors James Coan and the California State Employees' Association (CSEA) sued California in the California Supreme Court, seeking a writ of mandate which would direct the state officials to pay the entire increases. On April 19, 1974 the California Supreme Court filed its decision directing the state officials to comply with the State Budget Act. *Coan* v. *State of California*, 11 Cal.3d 286; 113 Cal. Rptr. 187; 520 P.2d 1003 (1974). That decision became final and effective on May 19, 1974. The Economic Stabilization Program ended on April 30, 1974, except as saved by Section 218 of the Economic Stabilization Act or by the general saving statute, 1 U.S.C. § 109. See *infra*.

On May 8, 1974 the United States filed its complaint in federal court[4] seeking injunctive relief to

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[3] By special legislation, funds necessary to implement the act are currently held in trust by the Director of the Department of Finance. California Statutes 1973, ch. 1136.

[4] An earlier federal action, in which California sought an injunction against enforcement of the CLC's order and a declaratory judgment that the Act and regulations could not be applied to California, is apparently still pending. *California* v. *United States*, C.A. No. S74-17 (E.D. Cal., filed Jan.

enjoin California from implementing the State Budget Act in disregard of the August 29, 1973 order of the CLC. After permitting James Coan and CSEA to intervene as parties defendant, the district court on May 17, 1974 issued its order granting the preliminary injunction sought. On June 17, 1974 the defendants filed with this Court separate notices of appeal, which were consolidated for appellate consideration.

Appellants first argue that the Economic Stabilization Act was not intended by Congress to be applied to states, and that even if such intention is found, the Act cannot be applied to the states under the Commerce Clause so as to regulate the exercise

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11, 1974). In its brief at 6-7, California states that in Civil Action No. S74-17, California is

> seeking to restrain enforcement of the Council's Decision and Order by a writ of injunction and to obtain a judgment declaring the Act and regulations unconstitutional as applied to the State of California. See § 211, Economic Stabilization Act. Among other allegations, the State raised the issues of whether Congress intended the Economic Stabilization Act to apply to the States and, if so, whether Congress had the constitutional authority to impose economic controls over State wages and salaries in light of sovereignty guaranteed to the States under the Tenth Amendment to the United States Constitution.

At oral argument, the Government argued that jurisdiction could be based on the "pending proceeding" in *California* v. *United States, supra.* Clearly, the "pending proceeding" upon which jurisdiction of this Court is to be founded must be the proceeding before it and not another case, even if based on similar facts. We do not, however, reach the issue raised by counsel as to whether jurisdiction is proper in that case.

of powers reserved to the states under the Tenth Amendment, when such exercise has no rational connection with interstate commerce. Appellants would thus have this Court adopt the reasoning of *Coan* v. *State of California, supra,* and *Fry* v. *Ferguson,* 34 Ohio F.2d 252, 298 N.E.2d 129 (1973). This Court has, however, resolved these issues in favor of Congress' intent and power to regulate wages paid and charges received by states. *Murphy* v. *O'Brien,* 485 F.2d 671 (T.E.C.A. 1973); *United States* v. *State of Ohio,* 487 F.2d 936 (T.E.C.A. 1973), *cert. granted sub. nom. Fry* v. *United States,* 415 U.S. 912 (1974).

Second, appellants state that the subject matter jurisdiction of the district court and this Court is the principal inquiry on this appeal. This action was filed on May 8, 1974, one week after the expiration of economic controls. Section 218 of the Economic Stabilization Act provides as follows:

> The authority to issue and enforce orders and regulations under this title expires at midnight April 30, 1974, but such expiration shall not affect any action or pending proceeding, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to May 1, 1974.

The August 29, 1973 decision and order of the CLC forbids the state to pay a wage and salary increase in excess of seven percent for the period in question. However, by the explicit terms of Section 218, the CLC and the courts have lost their authority to enforce the order on April 30, 1974, unless one of the

two stated exceptions of Section 218 is applicable, or unless such authority is extended by the general saving statute, 1 U.S.C. § 109.

Before discussing in detail the specific arguments of the Government as to how these exceptions might be held to apply, it is helpful to consider the judicial interpretation of "saving clauses" other than Section 218. In *Talbot* v. *Woods*, 164 F.2d 493 (Em. App. 1947), the Emergency Court of Appeals considered Section 1(b) of the Emergency Price Control Act of 1942, which read in pertinent part as follows:

> The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1947 * * *; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

Judge Magruder, writing for a unanimous court, observed that Section 1(b), permitting "suit, action, or prosecution" to be maintained, "obviously refers to civil and criminal *enforcement* proceedings predicated upon past *violations* alleged to have been committed while the Act and regulations thereunder were still in effect . . . ." 164 F.2d at 496 (emphasis added). Since it was undisputed that there was no pending civil or criminal *enforcement* action based on a past violation of an order, a judgment was en-

tered ordering the dismissal of the complaint for lack of jurisdiction. In accord, see *Standard Kosher Poultry* v. *Clark*, 163 F.2d 430 (Em. App. 1947).

In *Stanolind Oil & Gas Co.* v. *Freehill*, 205 F.2d 305 (Em. App. 1953), Stanolind and others sought review of an order of the Director of Price Stabilization which fixed the ceiling price of natural gas produced from an oil field in which the plaintiffs held an interest. Subsequent to the filing of the complaint, the Director issued an order exempting sales of natural gas from price ceilings. The Emergency Court of Appeals, interpreting the Defense Production Act of 1950,[5] held that the complaint would be dismissed because the plaintiffs made "no claim that they have violated any of the provisions of the regulations or orders at issue in suit, or that they are subject to enforcement action therefor; nor that there is any *enforcement* suit pending or contemplated for any such violation." 205 F.2d at 306 (emphasis added).

In *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535 (1953), the United States Supreme Court con-

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[5] The saving clause of the Defense Production Act of 1950, 50 U.S.C. (App.) § 2156(b), provided in pertinent part as follows:

> The termination of the authority granted in any title or section of this Act, or of any rule, regulation, or order issued thereunder, shall not operate to defeat any suit, action, or prosecution, whether theretofore or thereafter commenced, with respect to any right, liability, or offense incurred or committed prior to the termination date of such title or of such rule, regulation, or order.

sidered the saving clauses of the Stabilization Act of 1942 and the Defense Production Act of 1950. The Court found the provisions to be without any material difference,[6] and held that the language of the 1950 statute "should receive the same construction now that was placed on similar language in the [Stabilization] Act of 1942." 347 U.S. at 551. In addition, the Court applied the general saving statute, 1 U.S.C. § 109, which provided in pertinent part as follows:[7]

> The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

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[6] A similar conclusion was reached by the First Circuit in *Bryne* v. *United States*, 218 F.2d 327 (1st Cir. 1955), in which Judge Magruder, writing for the court, stated at 335:

> It is true that the saving clause in the Defense Production Act is expressed in somewhat different phraseology from the saving clause in the Emergency Price Control Act of 1942. Despite this change in phraseology, the Emergency Court of Appeals has assumed, we think correctly, that no difference in effect was intended. Haldeman Creamery, Inc. v. Kendall, Em. App., 1953, 208 F.2d 360, 363, 364; Lambert's Point Docks, Inc. v. Kendall, Em. App., 1954, 215 F.2d 455.

[7] The Court applied the general saving statute because it could "find no express, or even implied, provision in the [Defense Production] Act [of 1950] contrary to the policy of the general savings statute." 347 U.S. at 554.

The Court decided that the "precise object of the general savings statute is to prevent the expiration of a temporary statute from cutting off appropriate measures *to enforce* the expired statute in relation to violations of it, or of regulations issued under it, occurring before its expiration." 347 U.S. at 554-55 (emphasis added).

In response to this consistent line of authority, the Government is able to cite no cases which would permit it to bring this suit after the expiration date of the Act to enjoin California from *now* taking the action it properly refrained from taking during the existence of the Act. Nevertheless, the Government argues that this case can be brought within the exceptions to Section 218. This contention must be considered in light of two important rules of statutory construction: 1) jurisdictional statutes are to be strictly construed. "[I]n construing a definite procedural provision we do well to stick close to the text and not import argumentative qualifications from broad, unexpressed claims of policy." *Utah Junk Co.* v. *Porter*, 328 U.S. 39, 44 (1946); 2) exceptions to the general provisions of a statute are also to be strictly construed. See *United States* v. *First City National Bank*, 386 U.S. 361 (1967).

The first exception to the general expiration provision of Section 218 is expressed by the clause: ". . . such expiration shall not affect any action or pending proceeding, civil or criminal, not finally determined on such date . . . ." The Government suggests two ways in which this exception might apply

here. First, it is argued that there is a pending civil proceeding, in that California and CSEA had submitted themselves to the jurisdiction of the federal district court in Civil Action No. S74-17, which was filed before the expiration of controls.[8] That action was brought by California against the CLC to obtain judicial review of the CLC's August 29, 1973 order. If this Court were to hold that by doing so California submitted itself to a continuing jurisdiction that was not available for enforcement against those employers who did not seek such review, then our decision would be in effect a penalty visited upon California solely because it exercised its statutory right to judicial review of the CLC's order. It seems beyond cavil that California's filing of the judicial review proceedings is not the kind of "pending proceeding" that the Government can use as a justification for bringing this suit. In any event, we would ignore the clear and consistent prior interpretation of "pending proceeding" as meaning "pending enforcement proceeding" were we to justify jurisdiction here on the basis of California's assertion of its right to judicial review. Secondly, the Government asserts that the administrative proceedings through which the CLC prevented the payment of the wage increases during the existence of the Act "can reasonably be considered to be a 'proceeding' not finally determined by May 1, 1974." Appellee's Brief at 15. This argument is clearly without merit. California

[8] See note 4, *supra*.

exhausted its available administrative review procedures on February 1, 1974, and remained in strict compliance with the final CLC order. There are no longer any pending administrative proceedings.

The second exception to the general expiration provision of Section 218 is that "such expiration shall not affect . . . any action or proceeding based upon any act committed prior to May 1, 1974." This provision is clearly designed to allow the initiation of proceedings after the expiration date of the Act, so long as such proceedings are based upon an act committed before expiration. The Government points to four acts which it argues are sufficient to sustain the application of the second exception.[9] None of those acts, however, constituted *violations* of the Act, regulations, or the CLC's order such that they could be the basis for a civil or criminal enforcement proceeding. Indeed, the Government admitted in its complaint that "[a]t all times defendants herein have complied with said Decision and Order and have not paid out any salaries or wages in excess of said

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[9] The district court found, in paragraph 11 of the Findings of Fact, that the following acts were committed by California:

> Within the context of the Economic Stabilization Act of 1970, as amended in 1971 and 1973, the acts committed include, but are not limited to: the enactment of the California Budget Act of 1973; the resulting challenges by the Cost of Living Council; the Decision and Orders of the Cost of Living Council; defendants' petitions for reconsideration; the filing of lawsuits by defendants in State and Federal Courts; defendants' threats to pay out the disallowed wage and salary increases.

Decision and Order." R. at 3. During the period in question, Phase III voluntary controls were in effect. Therefore, only *payment* of wages in violation of a CLC order could constitute an act in violation of the Act.[10]

The first act mentioned by the Government, the passage of the State Budget Act, could obviously never be a violation of the Act or the subject of an enforcement proceeding. The act which, had it occurred, could have been the subject of such proceedings was the implementation of the State Budget Act by paying the wage and salary increases, after they had been successfully challenged, to the state employees. The CLC order prevented this implementation, and it cannot be said that the mere passage of a law by the state government is such an act as is contemplated by Section 218.

The second act advanced by the Government is the administrative proceedings through which the CLC prevented the implementation of the State Budget Act. These proceedings were initiated by the CLC, not California, and are not acts of California except to the extent that California filed a request for review, which was its statutory right. Even if they were considered to be acts of California, these proceedings are not acts upon which any action or proceeding for enforcement could be based.

The third act suggested by the Government is the threat made by California to pay out the wage and salary increases. However, there is no indication

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[10] See note 1, *supra*.

whatever in the record that any threat was made before the expiration date. In paragraph 2 of the Findings of Fact, filed June 25, 1974, almost two months after the expiration date, the district court stated that defendants "*now* threaten to pay out the disallowed wage and salary increases *on May 20, 1974 or as soon thereafter as* possible . . . ." (emphasis added). The decision in *Coan* v. *California, supra,* was to become final on May 19, 1974, and defendants faced the possibility of being in contempt of the California Supreme Court after that date. The California Supreme Court's decision was effectively restrained by the issuance of the preliminary injunction in this case on May 17, 1974. At any rate, it is the undisputed finding of the district court that the threat made was a threat to pay the amounts on May 20, 1974, and nothing in the record suggests that this threat was made before the expiration date. Moreover, as discussed *infra* (see note 11), any prohibitions against *agreements* to pay were eliminated by Executive Order No. 11695.

The fourth act is the filing of the separate federal court civil action by California. That action was not brought by the Government as a civil or criminal enforcement proceeding. At any rate, as discussed above, the filing of such a judicial review action was California's statutory right, and was not such an act as would now support the bringing of an enforcement proceeding by the Government.

In supplemental memoranda requested by the Court after oral argument, the parties have briefed the ques-

tion of the applicability *vel non* of *United States* v. *I.B.E.W. Local 11*, 475 F.2d 1204 (T.E.C.A. 1973), which was not cited by any of the parties. Having duly considered the matter, we are of the opinion that the decision is not relevant here. *In I.B.E.W.* the defendant union entered into wage agreements which provided for increases in excess of those permitted by the Phase II mandatory wage regulations. The agreements were entered into without obtaining the prior affirmative approval of the agency, as required by the regulations. After the agency reviewed the proposed increases and disapproved a portion of them, the defendant union and employers entered into agreements to escrow the disapproved portions and pay them "at such times as they may legally do so." This Court affirmed the issuance of injunctions against such conduct.

Section 218 was not at issue in *I.B.E.W.* The only analogy that can be made between the cases is to argue that to permit California to pass the State Budget Act during controls, and then to delay its implementation until after the expiration of controls, is to allow California to pursue the same type of conduct which was forbidden by the agency and this Court in *I.B.E.W.* This superficial similarity between the cases disappears upon close examination. In *I.B.E.W.* the illegal escrow agreement was entered into *after* the negotiated wage increases had been disapproved; in this case the CLC did not challenge the proposed increases until after the State Budget Act had been enacted and was scheduled to be

implemented. In *I.B.E.W.*, it was illegal under the Phase II mandatory controls to pay *or to agree to pay* amounts higher than those specified in the regulations.[11] In this case, the Phase III guidelines as to

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[11] Section 1(a) of Executive Order 11640 (issued on January 27, 1972 under the authority of Public Law 92-210, 85 Stat. 743, December 22, 1971) provided that:

> * * * no person shall, directly or indirectly, *pay or agree to pay*, in any transaction, wages or salaries in any form, or to use any means to obtain payment of wages and salaries in any form, higher than those permitted hereunder, whether by retroactive increase or otherwise. (Emphasis added.)

Also, 6 C.F.R. § 201.41 (37 F.R. 24960, November 23, 1972) of the Pay Board regulations provided in pertinent part:

> (a) *In general.* Except as provided in paragraph (b) of this section, it shall be a violation of the provisions of this chapter, subject to the sanctions, fines, penalties, and other relief provided in the Act, for any person to—
>
> (1) *Payment.* Pay, directly or indirectly, immediately or on a deferred basis, any portion of a wage and salary increase not authorized by the provisions of this chapter or by decision or order of the Pay Board or its delegate;
>
> (2) *Receipt.* Receive or accept, directly or indirectly, any portion of a wage and salary increase not authorized by the provisions of this chapter or by decision or order of the Pay Board or its delegate;
>
> (3) *Accessorial acts or attempts.* Induce, solicit, encourage, force, or require, or attempt to induce, solicit, *encourage, force, or require, any other person to pay or to receive, directly or indirectly,* any portion of a wage and salary increase not authorized by the provisions of

permissible wage increases were voluntary and adjustable for certain factors; the only way that the regulations could be violated was to pay an increase which had already been challenged and specifically disapproved by the agency. In *I.B.E.W.* there were official circulars and question-and-answer sheets published by the agency which clearly stated that escrow agreements of the type entered into by I.B.E.W. were illegal; in this case the increases legislated by California were permissible under the provisions of the Phase III regulations until they were later challenged and disapproved by the CLC. In summary, in *I.B.E.W.* the union violated mandatory controls and specific agency orders; in this case California, acting under voluntary controls, has admittedly violated no agency regulation or order.

Since neither of the exceptions to Section 218 is applicable to these circumstances, a judgment will be entered ordering the dismissal of the complaint for lack of jurisdiction.

So ordered.

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this chapter or by decision or order of the Pay Board or its delegate . . . (Emphasis added.)

By Executive Order No. 11695, 38 F.R. 1473 (January 12, 1973), however, the President moved the Stabilization Program into what is commonly known as Phase III. Because economic controls were thereby made voluntary and self-administering, it was no longer a violation of the Act to agree to pay or induce and require to be paid wages in excess of CLC guidelines.

APPENDIX B

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BEFORE JUDGES CARTER, CHRISTENSEN AND ESTES

Nos. 9-13 and 9-14

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

STATE OF CALIFORNIA, ET AL., DEFENDANTS-APPELLANTS

and

JAMES COAN AND CALIFORNIA STATE EMPLOYEES' ASSOCIATION, INTERVENORS-APPELLANTS

This cause came on to be heard on the record on appeal from the U. S. District Court for the Eastern District of California and was argued by counsel, whereupon,

IT IS ORDERED that a judgment will be entered ordering the dismissal of the complaint for lack of jurisdiction.

A TRUE COPY

FOR THE COURT:
THOMAS R. NAPTON
Clerk

By /s/ Donna M. Bold
DONNA M. BOLD
Deputy Clerk

September 19, 1974

(District Court No. Civ. S74-186)

[SEAL]

APPENDIX C

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BEFORE: Honorable James M. Carter
Honorable A. Sherman Christensen and
Honorable Joe Ewing Estes, Judges

Nos. 9-13 and 9-14

[Received Nov. 13, 1974, Docket Unit, Civil Division]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

STATE OF CALIFORNIA, ET AL.,
DEFENDANTS-APPELLANTS

and

JAMES COAN AND CALIFORNIA STATE EMPLOYEES' ASSOCIATION, INTERVENORS-APPELLANTS

Upon consideration of Appellee's Petition for Rehearing and Appellants' Opposition thereto,

IT IS ORDERED that the petition for rehearing is DENIED.

FOR THE COURT:

Thomas R. Napton
Clerk

by /s/ Donald E. Gladstone
Donald E. Gladstone
Chief Deputy Clerk

November 12, 1974

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BEFORE: Honorable Edward Allen Tamm,
Chief Judge
Honorable Jame M. Carter
Honorable William H. Hastie
Honorable Robert P. Anderson
Honorable A. Sherman Christensen
Honorable Martin D. Van Oosterhout
Honorable Joe Ewing Estes
Honorable Frank M. Johnson, Jr.
Honorable John S. Hastings

Nos. 9-13 and 9-14

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

STATE OF CALIFORNIA, ET AL.,
DEFENDANTS-APPELLANTS

and

JAMES COAN AND CALIFORNIA STATE EMPLOYEES' ASSOCIATION, INTERVENORS-APPELLANTS

Upon consideration of Appellee's Suggestion for Rehearing *En Banc* and Appellants' Response thereto; and a vote having been taken by the court,

IT IS ORDERED that the suggestion for rehearing *en banc* is DENIED.

/s/ Edward Allen Tamm
Edward Allen Tamm

November 12, 1974

Circuit Judge James M. Carter would grant appellee's suggestion for rehearing *en banc.*

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil No. S74-186

[Filed Jun. 25, 1974, Clerk, U.S. District Court, Eastern District of California. By , Deputy Clerk]

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA, ET AL., DEFENDANTS

JAMES COAN AND CALIFORNIA STATE EMPLOYEES' ASSOCIATION, INTERVENORS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court on May 17, 1974, on the Court's Order to Show Cause why a preliminary injunction should not issue to restrain and enjoin payment of wage and salary increases by defendants in contravention of orders issued by the Cost of Living Counsel, an agency of the United States.

Prior to the hearing on this matter, a motion for summary judgment and administrative record (with its attached exhibits) were filed by the United States in the companion case of *California* v. *United States, et al.*, Eastern District of California, Civil Number

S74-17. The Court was advised, *inter alia*, by counsel for defendants that the salary and wage increases were to be paid out on or after May 20, 1974—in violation of the orders issued by the Cost of Living Council. The Court having further considered the presentations and arguments of all counsel and being fully advised in the premises, now makes its findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Cost of Living Council has ordered defendants not to pay certain portions of legislated wage and salarly increases for work performed during the period of July 1, 1973 through April 30, 1974.

2. Defendants now threaten to pay out the disallowed wage and salary increases on May 20, 1974 or as soon thereafter as possible—unless enjoined against so doing by this Court.

3. On January 17, 1974, defendants herein filed the action of *California, et al* v. *United States of America*, Civil Number S74-17, asking this Court, *inter alia*, to review the Decision and Order of the Cost of I iving Council with respect to the aforementioned wage and salary increases. A motion for summary judgment made by the United States is now pending in that case.

4. The status quo to be preserved is the continuation of non-payment, by defendants, of the disallowed wage and salary increases. The status quo

also to be preserved is maintenance and preservation of all issues now before this Court in the companion case of *California, et al,* v. *United States of America,* Civil No. S74-17.

5. The Public Interest is promoted by the issuance of the preliminary injunction, herein, for the following reasons:

a. Payment of the disallowed increase by the State of California would thwart Congressional intent and undermine the ongoing national campaign against inflation.

b. Payment, prior to the determination of the Constitutional and other issues by this Court and the U.S. Supreme Court would undercut the jurisdiction and dignity of both Courts.

c. The State of California is a major size employer, and any illegal payment made by California would necessarily encourage other major employers (including other states who are in *voluntary* compliance) to violate the Economic Stabilization Act and its forthcoming successor acts, if any.

d. Payment by defendants would subject them to criminal and civil penalties.

e. Illegal and erroneous payments, later confirmed as such by the United States Supreme Court, would subject defendants to innumerable lawsuits by the United States and also to innumerable lawsuits by the Taxpayer-Citizens of the State of California.

f. Said payments would result in fiscal chaos in the State of California—leading to even additional charges on the tax bills of the citizens of California.

6. Payment of the aforementioned disallowed increases will result in irreparable harm to both plaintiff and defendants for the reasons set out in paragraph 5 above.

7. There is great likelihood that the United States of America will succeed on the merits of this case and also succeed on the merits in *California, et al., v. United States of America, Civil Number S74-17.*

8. The balancing of equities compels the granting of preliminary injunction against the defendants. If defendants are allowed to pay out the disallowed wage and salary increases, this action will undercut the goals of the United States as set out in its Motion for Summary Judgment in Action Number Civil S74-17. Said payment will also thwart the intent of Congress and undermine the authority of the Cost of Living Council. If defendants are enjoined from paying out the wage and salary increases pending final determination on the merits, I am informed that the fund representing the wage and salary increases will be held intact in trust with interest thereupon accruing.

9. Action Number Civil S74-17 is a pending civil proceeding not finally determined prior to May 1, 1974. Said proceeding is based upon regulations, orders, and enforcement thereof, under the Economic Stabilization Act of 1970, and the Economic Stabilization Act amendments of 1971 and 1973. Said regulations and orders were in effect prior to April 30, 1974. Said pending civil proceeding is also based on acts committed prior to May 1, 1974.

10. The instant action for injunctive relief is a civil proceeding based on acts committed prior to May 1, 1974.

11. Within the context of the Economic Stabilization Act of 1970, as amended in 1971 and 1973, the acts committed include, but are not limited to: the enactment of the California Budget Act of 1973; the resulting challenges by the Cost of Living Counsel; the Decision and Orders of the Cost of Living Council; defendants' petitions for reconsideration; the filing of lawsuits by defendants in State and Federal Courts; defendants' threats to pay out the disallowed wage and salary increases.

CONCLUSIONS OF LAW

1. Jurisdiction herein is founded upon Sections 209, 211, and 218 of the Economic Stabilization Act of 1970, as amended in 1971 and 1973. Jurisdiction is also founded upon 1 U.S.C. 109 and 28 U.S.C. 1345.

2. There is a great likelihood that the United States of America will prevail on the merits in the instant case and in its companion case, Civil Number S74-17.

3. Unless the defendants are enjoined from paying out the disallowed portions of the wage and salary increases, the Public Interest is and will be threatened.

4. Unless the defendants are so enjoined, irreparable harm will result to the Governments of the United States of America and the State of California, their officers, and the citizens of both sovereigns.

5. The balancing of equities compels the granting of the preliminary injunction against defendants.

6. The granting of the preliminary injunction against defendants will preserve and maintain the status quo until final determination on the merits in the instant case and in action number Civil S74-17.

DATED: June 24, 1974

/s/ Philip C. Wilkins
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil No. S74-186

[Original Filed May 17, 1974, Clerk, U.S. District Court, Eastern District of California. By ————, Deputy Clerk]

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA, ET AL., DEFENDANTS

JAMES COAN AND CALIFORNIA STATE EMPLOYEES' ASSOCIATION, INTERVENORS

ORDER GRANTING PRELIMINARY INJUNCTION

This matter came before the Court on May 17, 1974, on the Court's Order to Show Cause why a preliminary injunction should not issue to restrain and enjoin payment of wage and salary increases by defendants in contravention of orders issued by the Cost of Living Council, an agency of the United States.

The Court having considered the motion and memoranda of all parties and having heard the oral argument of counsel, and the Court being fully advised in the premises finds that the Court has jurisdiction, that there is a likelihood of plaintiff herein succeed-

ing on the merits in this case, and that the public interests will be served by the granting of this preliminary injunction. It is therefore,

ORDERED, ADJUDGED, and DECREED that defendants, their agents and employees be and are hereby prohibited and enjoined from paying any wage or salary increases legislated by the California Budget Act of 1973, payable for work performed during the period of July 1, 1973, through April 30, 1974, in excess of those increases allowed by the Cost of Living Council in its Decision and Order dated August 29, 1973. Defendants, their agents and employees are so enjoined until final disposition of this case, final disposition of *California, et al.*, v. *United States, et al.*, Civil S74-17, (E. D. Calif), and final disposition of *Fry* v. *United States*, United States Supreme Court Number 73-822.

DATED: May 17, 1974.

/s/ Philip C. Wilkins
United States District Judge

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SUPREME COURT, U. S.
FILED
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MICHAEL RODAK, JR.,

No. 74-739

In the Supreme Court of the United States
OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER,

v.

STATE OF CALIFORNIA, et al., and JAMES COAN

and the

CALIFORNIA STATE EMPLOYEES' ASSOCIATION,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR RESPONDENTS JAMES COAN AND CALIFORNIA STATE EMPLOYEES' ASSOCIATION IN OPPOSITION

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No. 74-739

In the Supreme Court of the United States

OCTOBER TERM, 1974

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RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

OPINIONS BELOW

The opinion references are adequately set forth in the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether the instant case is a proper one for the exercise of the Court's certiorari power where the question presented no longer is of any substantial continuing importance.

2. Whether section 218 of the Economic Stabilization Act of 1970 precludes enforcement of the Act, and orders and regulations issued pursuant to it, after the expiration of the Act on April 30, 1974.

STATUTES INVOLVED

The statutes involved are adequately set forth in the petition.

STATEMENT

On July 1, 1973, the California Budget Act of 1973, Cal.Stats. 1973, Chapter 129, became effective. The budget provided for salary increases for state employees ranging from 0% to 30%, depending upon the particular civil service classification. The average (mean) salary increase was 12.9%. The Cost of Living Council (CLC) issued a Notice of Challenge restraining implementation of the salary program until a hearing was held and a Decision and Order issued. On July 12, 1973, respondents James Coan and CSEA filed a petition for writ of mandamus in the California Supreme Court seeking an order compelling the State of California

and named officials to pay the salaries contained in the Budget Act of 1973, notwithstanding any action by the CLC.

The CLC issued its Decision and Order on August 29, 1973, disallowing salary increases above an average of 7%. On September 7, 1973, CSEA filed a request for modification or rescission of the decision and requested a hearing. On September 8, 1973, the State of California filed a Request for Review.

On October 2, 1973, the State of California enacted SB 1461, Collier, Cal.Stats. 1973, Chapter 1136. This statute did not constitute an escrow arrangement since there was no agreement concerning such between employer and employees, and there was no intent to pay said sums upon expiration of controls. The statute was passed for the expressed purpose of preventing the appropriated funds from reverting to the "General Fund" for other state programs, and not to obviate any federal economic regulation.

On April 19, 1974, the California Supreme Court decided Coan and CSEA v. California, 11 Cal.3d 286 (1974), ordering the State of California to pay the salaries contained in the California Budget Act of 1973. On April 30, 1974, the Economic Stabilization Act of 1970, as amended, expired, and by virtue of section 218 of said Act, the authority to issue and enforce orders and regulations likewise expired. Notwithstanding the order of the California Supreme Court, the expiration of the Economic Stabilization Act, and the absence of an enforceable wage order, California did not pay the salary increases contained in the Budget Act of 1973, thereby clearly indicating that the Collier Bill, Cal.Stats. 1973, Chapter 1136, was not an escrow measure.

Contrary to the representation of petitioner, California did not state that it would immediately pay the increases upon the expiration of the Act. Rather, despite the demands of the California State Employees' Association, the State of California refused to pay such increases, and stated that such increases would not be paid until the mandate of the California Supreme Court issued compelling such payment.1/ The failure to pay or to take steps in preparing to pay the increases after the mandate of the California Supreme Court issued would have placed the State of California in contempt of that Court. (See Petition, Appendix A, pp. 12a-13a.)

On May 8, 1974, more than a week after the expiration of the Economic Stabilization Act and its attendant authority, the United States filed a complaint for injunctive relief in United States District Court for the Eastern District of California (Civil Action No. S 74-186) (Record, pp. 1-62). The complaint conceded that "[a]t all times defendants herein have complied with said Decision and Order and have not paid out any salaries or wages in excess of said Decision and Order." (Record on Appeal, p. 3; Petition, Appendix A, pp. 11a-12a.) The District Court granted the Government's request for a preliminary injunction.

The District Court's decision was appealed by both James Coan and the California State

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1/ The decision of the California Supreme Court became final on May 19, 1974, at which time the mandate of the Court would have issued had not the Federal Government obtained an injunction in the United States District Court on May 17, 1974.

Employees' Association and the State of California to the Temporary Emergency Court of Appeals. The Emergency Court reversed, holding that in light of section 218 of the Act, the District Court lacked jurisdiction to issue preliminary injunctive relief. The Court held that the Government had failed to demonstrate any violation of the Act on the part of California and that no enforcement proceeding predicated upon acts committed by California during the period of controls was pending (Petition, Appendix A). The Government's petitions for rehearing and rehearing en banc were denied.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied because the questions presented by the petition concern only matters involving the interpretation of an expired statute and thereby lack any substantial continuing importance. Certiorari is not appropriate to such review of expired statutes.

Section 218 of the Economic Stabilization Act of 1970, as amended, specifically provides that the authority of the Government to enforce any orders of the CLC expired on April 30, 1974. The Government is unable to bring itself within either of the two exceptions to section 218. There have been no acts in violation of the Economic Stabilization Act or its attendant orders and regulations committed while that law was in effect, as the Government has expressly conceded. Furthermore, no enforcement proceeding was brought by the Government against California prior to the expiration of the Act; hence, no such proceeding was pending on April 30, 1974.

The General Savings Statute, 1 U.S.C. § 109, only operates to preserve liability which may have been incurred under a temporary statute

prior to its expiration. It does not, as the Government impliedly asserts, continue the effectiveness of a temporary statute indefinitely. Since no liability was incurred by California under the Act prior to its expiration, as the Government has conceded, the General Savings Statute is inapplicable.

ARGUMENT

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE QUESTIONS PRESENTED HAVE NO CONTINUING IMPORTANCE 2/

The question presented by the petition for a writ of certiorari is one of statutory interpretation--whether the Government can continue to enforce an

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2/ The Solicitor General has made this identical argument in another case pending before this Court involving the same statute. Fry v. United States, No. 73-822. (See the Solicitor General's Motion to Dismiss the Writ of Certiorari and the Solicitor General's Brief for the United States.)

If this argument was applicable in Fry, a case which directly involved the constitutional question of congressional power to regulate state salaries, then a fortiorari it is applicable to the instant proceeding, a case which involves questions of statutory interpretations of a long expired act.

Counsel has been informed that the Solicitor General has filed a letter with the Court in the Fry case in which he purports to withdraw his argument on this point. While the Solicitor General may

order of the Cost of Living Council after the expiration of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended by P.L. 92-210, 85 Stat. 743 and P.L. 93-28, 87 Stat. 27. The complaint for injunctive relief in this case was filed in the United States District Court, Eastern District of California, on May 8, 1974, to consider whether a decision ordering the payment of salaries to state employees in accordance with the California Budget Act of 1973 could be legally restrained under the provisions of the Economic Stabilization Act of 1970, as amended. The authority delegated by Congress to the President to implement and enforce wage and salary controls expired on April 30, 1974 (87 Stat. 29).

It appears highly unlikely that there will be significant litigation involving wages and salaries of state employees under the Act. The questions presented here are at issue in no other cases to respondent's knowledge. There are no proceedings pending before the Cost of Living Council raising the questions involved in this case, and no litigation of this nature can arise with respect to wages and salaries paid for periods after April 30, 1974. The issues in this case, therefore, have no substantial continuing importance.

All the questions presented may be abstractly important and interesting, but there is no occasion

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have well founded reservations concerning the argument's applicability in Fry -- because of the important constitutional issue presented -- such concerns do not apply to the instant case, which is based upon the interpretation of an expired statute. Cf. Morris v. Weinberger, 410 U.S. 422 (1973).

for this Court to grant certiorari where the underlying statute is no longer in effect and there are few or no other pending cases involving the same issues. Since the Act has terminated, review should be denied because the issue is no longer of any continuing importance.3/ The Court should reserve consideration of this question until it arises in the context of an operative regulatory scheme of continuing significance.

In summary, this case is not appropriate for the exercise of this Court's certiorari jurisdiction under Rule 19 of the Rules of this Court. See Morris v. Weinberger, 410 U.S. 422 (1973); Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955).

3/ This case presents no conflict of decision among the Courts of Appeal. Even if a conflict existed certiorari should be denied. Denial is the usual disposition of a petition where the statute in question has expired or has been amended "in a manner which will prevent the problem from arising in the future." Stern & Gressman, Supreme Court Practice (4th ed.), p. 156.

II. SECTION 218 OF THE ECONOMIC STABILIZATION ACT OF 1970, AS AMENDED, PRECLUDES THE ENFORCEMENT OF ORDERS OF THE COST OF LIVING COUNCIL, RESTRAINING THE PAYMENT OF SALARY INCREASES TO CALIFORNIA STATE EMPLOYEES, AFTER THE EXPIRATION OF THE ACT

The Government contends that the Temporary Emergency Court of Appeals misinterpreted section 218 of the Act, and asserts that the statute prohibits the implementation of the salary increases in question. Because the very terms of the statute in question, section 218, are contrary to the Government's position, the Government, understandably, relies instead upon speculative reasoning and unfounded assertions[4/] to attempt to bolster its cause.

4/ Three examples of the unsupported speculative assertions relied upon by the Government include the following: (1) The decision of the Court below will encourage demands for higher wages in new agreements (Petition, pp. 8-9); (2) The decision creates windfalls for employees and will lead to further demands for salary increases and labor unrest (Petition, p. 10); and (3) Payment of the salary increases at this time would be highly inflationary (Petition, p. 10).

None of these contentions is supported by any facts. The Government offers no explanation of

Section 218 provides as follows:

"The authority to issue and enforce orders and regulations under this title expires at midnight April 30, 1974; but such expiration shall not affect any action or pending proceedings, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to May 1, 1974."

(Cont'd)
how the decision below is supposed to be directly tied to demands for higher wages in any new collective bargaining contracts. Since California State employees do not have collective bargaining rights, the Government must feel that somehow the decisions will affect collective bargaining contracts in other jurisdictions or other sectors, but neglects to state the supposed connection.

The "windfall" characterization is totally unfounded. The receipt by an employee of a salary increase that he was entitled to receive by law does not constitute a "windfall." In fact, in the instant case, the only reason that California employees received a comparatively large salary increase in 1973 was because they had been forced to forego normal cost of living salary increases in prior years. The 1973 pay increase was designed as a "catchup measure." See statistical table set forth in Appendix A.

Petitioner's reference to the supposed "inflationary" pay raise is surprising in light of the recent action taken by President Ford and the United States Senate with regard to a pay raise for federal employees.

The statute is patently clear. By its very terms section 218 precludes any enforcement action by the Government after April 30, 1974, unless one of the two stated exceptions is satisfied. The first exception provides that the Government can continue to litigate "any action or pending proceeding, civil or criminal, not finally determined on April 30, 1974." The second exception concerns "any order or proceeding based upon any act committed prior to May 1, 1974." The Temporary Emergency Court of Appeals correctly held that neither of these two exceptions applied to the instant case.

The Government relies on the second exception, citing as examples of "act[s] committed prior to May 1, 1974" (1) the enactment of the California Budget Act of 1973 (Stats. 1973, Ch.129), (2) the review of the pay increase and the Decision and Order issued by the Cost of Living Council, and (3) the lawsuit filed by respondents to seek

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(Cont'd)

On August 31, 1974, President Ford proposed a plan delaying a pay increase for federal employees from October 1, 1974, to January 1, 1975. Government Employee Relations Reporter (BNA) [hereinafter cited as GERR] , No. 571, p. A-2 (9-9-74). The Senate rejected the proposal, holding that the pay increase for the three months, which amounted to $700 million, was not unduly inflationary. GERR, No. 573, p. A-7 (9-23-74). The President relented and agreed to implement the pay increase effective October 1, 1974. GERR, No. 575, p. A-3 (10-7-74). Since Congress determined that $700 million pay increase for federal employees was not inflationary, it is difficult to understand the Government's attribution to Congress the intent to halt or delay a $60 million pay increase to state employees on grounds of inflation.

judicial review of the administrative action of the Council (Petition, pp. 11-12).[5] None of these alleged "acts" is of the type contemplated by section 218.

5/ The Government also asserts, in a footnote, that California created an illegal escrow. Petition, p. 12, fn. 11. The Government is unable to supply any details with regard to the alleged escrow. The evidence to the contrary is overwhelming. There was no escrow agreement; there was no expression of intent or other provision to pay all of the sums when controls expired; there was no statute or regulation which prohibited passage of the California Budget Act of 1973 and the Collier Bill, Cal.Stats 1973, Ch. 1136; and there was no payment on May 1, 1974, despite the fact that there was no enforceable order in effect which precluded payment. Furthermore, the Government has agreed that California had fully complied with the Decision and Order of the Council during the period of controls (Petition, Appendix A, pp. 11a-12a).

Petitioner's reliance on United States v. International Brotherhood of Electrical Workers, Local No. 11, 475 F.2d 1204 (Em.App. 1973), is misplaced. The Court below, which determined that Local 11 was inapplicable, had a great degree of expertise in this matter since two of the justices who participated in the decision below also joined in the opinion in Local 11 (Chief Justice Carter and Justice Christensen). Since the justices obviously knew the parameters of the Local 11 decision, they were uniquely qualified to determine its inapplicability, due to the actual lack of an escrow agreement and due to the different system of controls in effect, to the instant case. See Petition, Appendix A, pp. 14a-16a.

The Temporary Emergency Court of Appeals concluded that in order to come within the second exception to section 218, an "act" must constitute a violation of the Economic Stabilization Act (Petition, Appendix A, p. 11a). This interpretation is manifestly correct. Section 218 provides that the expiration of the Act shall not be a bar to a Government lawsuit "based upon any act committed prior to May 1, 1974." Since Congress did not intend that the Government should become a vexatious litigant and file lawsuits based upon any actions whatsoever, even those fully in accord with the Economic Stabilization Act, the term "act" must be limited to those matters which are not in accord with the Economic Stabilization Act. Hence, the term "act" must mean violations or actions illegal under the Act. Any other interpretation would be absurd.

Examination of the judicial history of prior control acts compels this result. For example, in Talbot v. Woods, 164 F.2d 493, 496 (Em.App. 1947), the Court held that the savings clause of the Emergency Price Control Act of 1942, that Act's equivalent to section 218, referred to enforcement proceedings predicated on violations occurring while the Act and regulations were still in effect. See also Standard Kosher Poultry v. Clark, 163 F.2d 430 (Em.App. 1947).

The first alleged "act", enactment of the State Budget Act, does not constitute a violation of the statute nor does it provide a basis on which the Government could file any type of meritorious "action or proceeding" after April 30, 1974. If the Budget Act had been implemented after an administrative order prohibiting such, then there would have been an "act" upon which to base legal action. Absent such, mere passage of the law does not give rise to a post-expiration cause of action against California.

The second "act" relied upon, the action of the Federal Cost of Living Council in reviewing the California budget provisions and the issuance of a Decision and Order by that Council, are acts of the Federal Government and cannot be attributed to the State of California or its employees. To assert this as an "act" giving rise to a cause of action against California is to reach the zenith of absurdity. The only act "committed" by California and its employees in this regard was to invoke the statutory right of filing requests for review. Certainly this cannot be the basis upon which to file an enforcement action against California and its employees.

The third "act" relied upon, the seeking of administrative and judicial review of the Council's order, reveals the inherent weakness of the Government's position. If the Government case is in such a posture that it feels compelled to assert that California's exercise of statutory and constitutional rights to judicial review opened the door to retaliatory action by the Government, then it is obvious that the petition is totally devoid of merit. What the Government is asking this Court to hold is that by exercising their due process rights, as well as statutory right, to judicial review of the administrative determination, California and its employees should suffer a penalty in the form of an enforcement action against them that would have been unavailable had not their rights to judicial review been exercised. Merely to state the argument is to refute it.6/

6/ Petitioners also urge that the civil action filed by California and its employees to seek judicial review of the Council's decision constitutes a "pending proceeding" coming within the first exception to section 218. Petition, p. 13, fn. 12. This argument is relegated to a footnote,

The thesis of the Government's case, that California and its employees committed "acts" prior to the expiration of the Economic Stabilization Act which give rise to a post-expiration cause of action, is expressly refuted by the Government's own admissions. In its complaint in this action, filed in the District Court on May 8, 1974, more than a week after the expiration of the Act, the Government conceded that "[a]t all times defendants herein have complied with said Decision and Order and have not paid out any salaries or wages in excess of said Decision and Order." (Record on Appeal, p. 3; see Petition, Appendix A, pp. 11a-12a.) Hence, the Government has conceded itself out of court.

The Government attempts to salvage its case by arguing that section 218 contains a third, unstated exception. It is urged that despite the clear, unequivocal language of the statute, authority remains to control salary payments under the guise of a "work performed" rationale; i.e., that payments cannot be made for work performed during the period August 15, 1971, to May 1,

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(Cont'd)
the Government apparently feeling that it did not warrant being placed in the text. This contention again urges that California be penalized for exercising its rights. Such a proposition is manifestly incompatible with our system of law. The Emergency Court rejected this contention and stated the following: "It seems beyond cavil that California's filing of the judicial review proceedings is not the kind of 'pending proceeding' that the Government can use as a justification for bringing this suit." Petition, Appendix A, p. 10a.

1974 (Petition, pp. 8, 16). The Act is expressly to the contrary. Section 218 provides that "the authority to ... enforce orders and regulations ... expires at midnight April 30, 1974." There is no third exception covering the Government's "work performed" contention.

III. THE GENERAL SAVINGS STATUTE, 1 U.S.C. SECTION 109, IS INAPPLICABLE

The Government contends that the General Savings Statute, 1 U.S.C. § 109, continues indefinitely the operative provisions of the Economic Stabilization Act and postpones indefinitely the provisions of section 218 proscribing the enforcement of Council orders after April 30, 1974 (Petition, pp. 14-16). If the argument of the petitioner were correct, it would mean there would be no such thing as a temporary statute, because under the Government's interpretation, the General Savings Statute operates to continue ad infinitum the provisions of every temporary statute.

The General Savings Statute, 1 U.S.C. § 109, provides in pertinent part as follows:

> "The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such a penalty, forfeiture or liability." (Emphasis added.)

As applied to the instant case, the General Savings Statute is concerned with any penalty, forfeiture or liability "incurred under" the Economic Stabilization Act of 1970, as amended. The United States has conceded that no such liability was incurred under the Act by California (Record on Appeal, p. 3; Petition, Appendix A, pp. 11a-12a). Since no liability was incurred under the Act while it was in force, and since no liability can be incurred under it after expiration, the General Savings Statute is inapplicable.

This result is compelled by a decision rendered by this Court which construed a prior temporary wage stabilization statute. In Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1953), this Court held that the General Savings Statute applied only to violations of a temporary statute, the Defense Production Act of 1950, occurring while the temporary statute was still in effect.

> "The precise object of the General Savings Statute is to prevent the expiration of a temporary statute from cutting off appropriate measures to enforce the expired statute in relation to violations of it, or of regulations issued under it, occurring before its expiration. United States v. Allied Oil Corp., 341 U.S. 1, 5; Fleming v. Mohawk, 331 U.S. 111." (Emphasis added.)
> 347 U.S. 554-55.

See also Quirk v. United States, 161 F.2d 138, 143 (8th Cir. 1947). The Government is unable to cite any authority which supports its position that it can bring suit after the expiration of the Act to enjoin acts occurring after the Act was permitted to expire. Its contention flies in the

face of the established law and must be rejected.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

Loren E. McMaster
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James Coan and California
State Employees'
Association

TABLE 1

Comparison of Increases in Salaries Reflected by Collective Bargaining Settlements with Increases in State of California Salaries

	1968	1969	1970	1971	1972	1973	Simple Cov.	Compound Average
Private Industry Collective Bargaining Settlements (1)	6.5	9.3	14.9	13.2	11.0	6.2	61.1	78.5
State of California Salary Increases	5.7	5.6	5.2	0	8.4	7.7	32.6	37.1

(1) Over the life of contract wage rate changes in nonmanufacturing private industry exclusive of construction where settlements affected 1,000 workers or more, annual periods ending June 30 of each year.

Source: State of California Department of Finance; U.S. Department of Labor, Bureau of Labor Statistics, Current Wage Developments.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-739

UNITED STATES OF AMERICA, *Petitioner*

v.

THE STATE OF CALIFORNIA, *et al.*

On a Petition for Writ of Certiorari to the United States Temporary Emergency Court of Appeals

BRIEF FOR THE STATE OF CALIFORNIA IN OPPOSITION

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IN THE

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No. 74-739

UNITED STATES OF AMERICA,
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v.

THE STATE OF CALIFORNIA,
et al.

On a Petition for Writ of Certiorari to the United States Temporary Emergency Court of Appeals

BRIEF FOR THE STATE OF CALIFORNIA IN OPPOSITION

The State of California, et al., respectfully opposes the Petition for Writ of Certiorari, filed herein on December 12, 1974, to review the judgment of the Temporary Emergency Court of Appeals.

OPINION BELOW

The judgment and opinion of the Temporary Emergency Court of Appeals, dated September 19, 1974, is reported at 504 F.2d 750.

On November 12, 1974, the Temporary Emergency Court of Appeals denied the government's Petition for Rehearing and Suggestion for Rehearing *En*

Banc,[1] but on November 18, 1974, granted the government's Motion to Stay Mandate pending a timely filing of the Petition for Writ of Certiorari herein.

JURISDICTION

Jurisdiction is invoked by petitioners pursuant to section 211(g) of the Economic Stabilization Act of 1970 ("Act"), as amended.[2]

QUESTION PRESENTED

Petitioner United States has admitted in its Complaint on file herein that "at *all* times" respondent State of California has complied with the August 1973 Decision and Order of the Cost of Living Council "and have not paid out any salaries or wages in excess of said Decision and Order". See 504 F.2d at 755. The Economic Stabilization Act expired on April 30, 1974, pursuant to section 218 of the Act. The only issue, therefore, is whether the Council may enforce its Decision and Order as to proposed State pay practices which do *not* involve federal laws, orders, or reg-

[1] Eight of the nine members of the Court denied the Suggestion for Rehearing *En Banc*. Circuit Judge James M. Carter, the only member of the Court who would have granted the Suggestion for Rehearing *En Banc*, joined Judges Estes and Christensen, the panel who decided this case, in the Order denying the Petition for Rehearing. Accordingly, the questions raised in the instant Petition for Writ of Certiorari have been brought to the attention of the entire panel of the Temporary Emergency Court of Appeals and have been unanimously rejected.

[2] Pub. L. 91-379, 84 Stats. 797; Pub. L. 92-10, 85 Stats. 743; Pub. L. 93-28, 87 Stats. 28. The text of the Act is contained in the Note to 12 U.S.C.A. § 1904 (1973 Poc.Pt.).

ulations violated during the period of economic controls. Stated another way:

DOES SECTION 218 OF THE ECONOMIC STABILIZATION ACT PERMIT CONTINUING JURISDICTION OF THE COST OF LIVING COUNCIL OVER POST-EXPIRATION PAY PRACTICES IN THE ADMITTED ABSENCE OF PAST VIOLATIONS COMMITTED WHILE THE ACT AND REGULATIONS THEREUNDER WERE STILL IN EFFECT?

STATUTES INVOLVED

The principal statutory provision upon which the decision of the lower court was predicated is section 218 of the Act, which provides as follows:

> "The authority to issue and enforce orders and regulations under this title expires at midnight April 30, 1974, but such expiration shall not affect any action or pending proceeding, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to May 1, 1974."

The General Saving Statute, 1 U.S.C. § 109, also provides in pertinent part:

> "... The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution

for the enforcement of such penalty, forfeiture, or liability."

STATEMENT OF THE CASE

The opinion of the lower court (504 F.2d 750) accurately articulates the posture of the instant case. However, the lower court's recent consideration and disposition of a related case, *State of California* v. *United States,* Temporary Emergency Court of Appeals No. 9–19, and petitioner's misleading characterization of that matter, must be mentioned. There, on October 3, 1974, Judge Thomas J. MacBride of the United States District Court for the Eastern District of California denied for lack of subject matter jurisdiction the government's Motion for Leave to File an Amended Counterclaim which sought an injunction against a California statute (Stats. 1974, Chap. 597), effective August 30, 1974, providing for a *prospective*[3] wage and salary increase for state employees for the month of September 1974. An appeal was taken

[3] The statute expressly excluded *retroactive* payment as follows: "The Legislature further declares that a similar adjustment for employees who retired or left state service during that period [July 1, 1973 to April 30, 1974] is merited and that it is the intent of the Legislature to make provision for for such an adjustment when and if such action is legally possible." (Brackets added.)

The legislation further provided:

"This act provides funds for an increase in salaries for services during the month of September 1974 and is not a retroactive payment for services rendered between July 1, 1973 and June 30, 1974."

The State of California therefore takes exception to petitioner's characterization of the statute as a "lump sum retroactive payment of the escrowed funds." (Petition, pp. 5-6, fn. 2.)

to the Temporary Emergency Court of Appeals on October 15, 1974; the petitioner's Motions for Injunction Pending Appeal and for Stay of Proceedings were granted, but following the Court's decision of November 12, 1974 in the instant case, the Court ordered the matter to proceed. A Suggestion for Hearing *En Banc* was denied on November 27, 1974, after a polling of each of the nine members of the Court. Following the filing of briefs, the matter was placed on the Court's summary calendar on December 18, 1974.

On December 23, 1974, the Court granted the Motions of appellee State of California and intervenor California State Employees' Association To Suspend and Vacate the Injunction Pending Appeal, and affirmed the judgment of dismissal by the District Court. On that same day, however, at the petitioner's instance, the Court stayed its decision "pending timely consideration by the United States Supreme Court of the Petition for Certiorari in TECA cases 9–13 and 9–14."

ARGUMENT IN OPPOSITION TO THE PETITION

Introduction

Without the benefit of a single case in its support, petitioner seeks a reconsideration by this Court of arguments which have received the attention of the entire nine-member panel of the Temporary Emergency Court of Appeals (see Footnote 1, *supra*). In denying rehearing and rehearing *en banc,* the Court

was presented with the precise legal and factual[4] arguments which make up the Petition for Writ of Certiorari herein.

I. Section 218 of the Act Has Been Construed by the Temporary Emergency Court of Appeals in a Manner Consistent With Over Thirty Years of Clear Judicial Precedent

In the United States District Court for the Eastern District of California, and indeed before the original panel of the Temporary Emergency Court of Appeals, petitioner United States urged:

> "There is nothing in the [Economic Stabilization] Act which indicates that Congress did not intend a comparable result with respect to preserving jurisdictional provisions in appropriate cases as was reached under the Emergency Price Control Act of 1942 and the Defense Production Act of 1950."[5] (Brackets added.)

Having relied on the statutory construction accorded similar language of prior control acts[6], and having received an adverse determination of such contention,

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[4] For example, in its Petition for Rehearing and Suggestion for Rehearing *En Banc* which was presented to the entire nine members of the court below, petitioner appended to its pleadings a twelve-page affidavit of former Director of the Cost of Living Council, Dr. John T. Dunlop, which expressed in some detail the government's fears of the "unraveling" and "inflationary" impact of the decision here appealed from.

[5] This statement appears at page 74 of the Record on Appeal (Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, page 12) and from Appellee's (petitioner's) Brief below, pages 26–27.

[6] At page 27 of Appellee's Brief, it was also alleged: "The Defense Production Act of 1950 contained language similar to that in section 218 of the Economic Stabilization Act."

petitioner in both its Petition for Rehearing and Suggestion for Rehearing *En Banc* below[7], and in the within Petition for Writ of Certiorari, now argues that section 218 of the Act should be read in a vacuum.

Suffice it to say that the Opinion below is supported not only by the prior decisions of this Honorable Court[8] and of former Emergency Courts of Appeal[9], but by numerous other cases involving the same or similar expiration (and saving) clauses of federal statutes. All such cases uniformly hold that the continuing jurisdiction of the federal agency in question must be predicated on violations of the federal statute (or regulations issued pursuant thereto) which were committed while the statute or regulations were still in effect. For decisions of other Emergency Courts of Appeal which have similarly refused to entertain post-expiration complaints, either for lack of subject matter jurisdiction or mootness, *see J. J. Schmitt* v. *Turney,* 169 F.2d 425 (Em.App. 1948); *Markbreiter* v. *Woods,* 163 F.2d 993 (Em.App. 1947); *Waseca Realty Corp.* v. *Porter,* 157 F.2d 67 (Em.App. 1946); *Fasons Realty Corp.* v. *Bowles,* 146 F.2d 499 (Em.App. 1944); *Chippewa County Co-Op Dairy* v. *Clark,* 163

[7] In its Petition for Rehearing (p. 5) below, petitioner for the first time argued: "It is submitted that section 218 should *not* be interpreted by reference to prior control acts." (Emphasis added.) The State of California was understandably shocked and dismayed at this inexplicable shift in petitioner's argument.

[8] *Allen* v. *Grand Central Aircraft Co.,* 347 U.S. 535, 74 S.Ct. 745, 98 L.Ed. 933 (1953).

[9] *Talbot* v. *Woods,* 164 F.2d 493 (Em.App. 1947); *Standard Kosher Poultry* v. *Clark,* 163 F.2d 430 (Em.App. 1947); *Stanolind Oil and Gas Co.* v. *Freehill,* 205 F.2d 305 (Em. App. 1953).

F.2d 753 (Em.App. 1947); *Creedon* v. *Stratton*, 74 F. Supp. 170, 180 (Neb. 1947) [10].

Petitioner has abandoned virtually *all* of the cases upon which reliance was placed in the Temporary Emergency Court of Appeals, and for good reason.[11] To petitioner's misfortune, its cases left little doubt (if any was present) that section 218 precluded continuing jurisdiction of the Cost of Living Council after April 30, 1974. This Court's decision in *Allen* v. *Grand Central Aircraft Co., supra,* 347 U.S. 535 (1953), relied on by petitioner, not only involved pre-expiration violations, but held that the specific or general "saving clause" permitted post-expiration suits only "to enforce the expired statute in relation to violations of it, or of regulations issued under it,

[10] The *Creedon* case is somewhat extreme in that there the District Court refused to award injunctive relief even as to *pre-expiration* violations. The State of California freely concedes that its *pre-expiration* violations would be subject to civil or criminal enforcement proceedings. Such proceedings would be inappropriate, however, and none have been instituted, because of California's close (and good faith) compliance with federal law. Such is admitted by petitioner United States, who has stated that "at *all* times" California complied with all federal law and orders prior to the April 30, 1974 expiration of the Economic Stabilization Act of 1970. See 504 F.2d at 755.

For criminal cases discussing jurisdiction over past violations of the Emergency Price Control Act of 1942, or conspiracy to commit such violations, see *Stillman* v. *United States,* 177 F.2d 607 (9th Cir. 1949) and *Quirk* v. *United States,* 161 F.2d 138 (8th Cir. 1947). Here, of course, neither a violation, or conspiracy to violate, federal law or orders was alleged (or even suggested) by petitioner United States before the District Court.

[11] The Temporary Emergency Court of Appeals held: ". . . the Government is able to cite *no cases* which would permit it to bring this suit after the expiration date of the Act. . . ." (Emphasis added.) 504 F.2d at 754.

occurring before its expiration." (Emphasis added.) 347 U.S. at 554–555. Petitioner's other cases were of similar effect: *Jonco Aircraft Corp.* v. *Franklin,* 346 U.S. 868 (1953) involved *pre-expiration* violations; *Haldeman Creamery Inc.* v. *Kendall,* 208 F.2d 360 (Em.App. 1953) held that "enforcement suits" could be brought for *pre-expiration* violations; *Bryne* v. *United States,* 218 F.2d 327 (1st Cir. 1955) concerned a *pre-expiration* enforcement suit; and in *De La Roma S.S. Co.* v. *United States,* 344 U.S. 386 (1952), the "act" upon which jurisdiction rested was the loss of a ship which occurred *prior to expiration* of the War Risk Insurance Act. Thus, *all* of the cases asserted by petitioner either did not reach the precise issue here or in fact expressly dictated that the acts of the State of California which occur subsequent to the expiration of economic controls are not subject to federal jurisdiction. Continuing jurisdiction is applicable only to pending civil or criminal *enforcement* proceedings, or to *violations* occurring prior to May 1, 1974. Here, there is neither a pending enforcement proceeding nor, as admitted by petitioner, a pre-expiration violation of the Economic Stabilization Act of 1970 by the State of California.

II. Petitioner United States Has Unequivocally Conceded That California Has Not Committed a Pre-expiration Violation, by "Escrow" or Otherwise

At oral argument in the lower court, the court (not petitioner United States) raised a question as to whether California may have created an "escrow" ac-

count for its salary purposes as disapproved by the Temporary Emergency Court of Appeals in *United States* v. *International Brotherhood of Electrical Workers,* 475 F.2d 1204 (T.E.C.A. 1973). Seizing on the suggestion, petitioner United States suddenly retreated from its earlier admission that California had *not* committed a pre-expiration violation [12] and filed with the Temporary Emergency Court of Appeals an extensive 21-page letter memorandum alleging that California had, over one year ago, improperly placed such funds in an illegal "escrow". The oppositions to such contention by the State and the California State Employees' Association, intervenor, are a matter of record and, of course, the Temporary Emergency Court of Appeals has agreed that no such violation occurred.

By the subject statute (Stats. 1973, Chapter 1136), effective *October 2, 1973,* unexpended sums in the 1973 Budget were merely transferred to the Salary Increase Fund "until appropriated by the Legislature." There was no intent to pay said sums upon the expiration of economic controls and, in fact, the State did not do so even though as of May 1, 1974, the date of expiration of the Economic Stabilization Act of 1970, there existed no outstanding federal injunction

[12] Petitioners in the District Court alleged that California "at all times" complied with the August 1973 Decision and Order of the Cost of Living Council "and have not paid out any salaries or wages in excess of said Decision and Order." 504 F.2d at 755.

or other order prohibiting payment.[13] Furthermore, petitioner United States, who fully participated as *amicus curiae* in *Coan* v. *State of California,* 11 Cal. 3d 286, 520 P.2d 1003 (1974) and argued extensively on *October 17, 1973,* was well aware of what it *now* alleges, over a *year later,* to be an illegal "escrow".

Even if the questioned reappropriation were deemed an "escrow", California acting under voluntary "Phase III" regulations violated no agency regulation or order. The lower court's rationale on this issue is sound, particularly in view of the fact that the same three members of the Temporary Emergency Court of Appeals who decided the *International Brotherhood* case found its inapplicability to the case at bar.

III. It Is Uncontroverted That the General Saving Statute (1 U.S.C. § 109), Like Section 218 of the Act, Permits the Institution of Civil or Criminal Enforcement Proceedings After Expiration Only Where Such Proceedings Are Predicated on Violations of the Act Committed While the Act Was Still in Effect

[13] In fact, as of May 1, 1974, the date of expiration, the State of California was faced with a judgment of its own Supreme Court in *Coan* v. *State of California, supra,* 11 Cal. 3d 286, 520 P.2d 1003 (1974), ordering payment of the salaries in question. The Supreme Court's mandate, effective May 19, 1974, would have placed California officials in contempt but for the injunction which petitioner obtained in the District Court on May 17, 1974. Upon a review of the record, the Temporary Emergency Court of Appeals has concluded that the Government has expressly conceded that California did *not* make any "threats" of paying the sums in question prior to expiration of the Act. See 504 F.2d at 756.

Petitioner contends that the General Saving Statute, 1 U.S.C. § 109, applies to California notwithstanding the limited jurisdiction of the Cost of Living Council under section 218 of the Act. The Temporary Emergency Court of Appeals has treated the application of the General Saving Statute (1 U.S.C. § 109) to post-expiration enforcement proceedings and has concluded that, like section 218 of the Act, such statute permits enforcement proceedings, after expiration, only as to violations of the Act occurring before expiration. 504 F.2d at 754. In so holding, the Court relied on a decision of this Court in *Allen* v. *Grand Central Aircraft Co., supra,* 347 U.S. 535 (1953), wherein the Court specifically held that 1 U.S.C. § 109 only permits actions "to *enforce* the expired statute in relation to *violations* of it, or of the regulations issued under it, *occurring before its expiration.*" (Emphasis added.) *Ibid.,* 347 U.S. at 554-555. Clearly, then, even the general saving statute does not permit continuing jurisdiction of the Council where there exists, as here, no violation which existed prior to expiration.[14]

[14] In its Petition for Rehearing and Suggestion for Rehearing *En Banc,* presented to the entire nine-member court below, petitioner raised a battery of five additional cases, three of which, without exception, negated petitioner's argument and uniformly held that the General Saving Clause (1 U.S.C. § 109) preserved jurisdiction only where there existed the commission of a violation *before* the expiration of controls. *Eastern Coal Co.* v. *N.L.R.B.,* 176 F.2d 131 (4th Cir. 1949); *N.L.R.B.* v. *National Garment Co.,* 166 F.2d 233, 237 (8th Cir. 1948); *N.L.R.B.* v. *Edw. G. Budd Mfg.,* 169 F.2d 571, 575 (6th Cir. 1948). The two remaining cases are easily distinguished for in one (*Herman* v. *Woods,* 175 F.2d 781 [Em.App. 1949]) juris-

IV. Section 218 of the Act, as Properly Construed by the Temporary Emergency Court of Appeals, Reflects a Clear Intent by Congress to Return to a Free Market

Upon the expiration of economic controls on April 30, 1974, President Nixon issued Executive Order No. 11781 and, in an accompanying statement, said to the Nation:

> "Mandatory wage and price controls of the last three years have served a useful function, especially in their early stages, but increasingly they have become obstacles to the effective performance of the economy. We have therefore been reducing the coverage of direct controls, gradually at first and rapidly in the last few months. Our continu-

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diction was predicated on a *pre-expiration* violation, and in the other (*Hertz* v. *Woodman*, 218 U.S. 205 [1910]) legacies received under the War Revenue Act, a "liability" under the Act while effective, were subject to continuing tax liability after expiration. Neither a pre-expiration violation, nor civil or criminal liability, are present here.

In order for the general saving clause (1 U.S.C. § 109) to apply, other courts in a variety of circumstances have uniformly required the operative act or "violation" to have occurred *during the statute's effectiveness.* See, *e.g.*, *United States* v. *Carter*, 171 F.2d 530, 532 (5th Cir. 1948); *Professional and Business Men's Life Ins. Co.* v. *Bankers Life*, 163 F.Supp. 274, 295 (Mont. 1958); *Bowen* v. *United States*, 171 F.2d 533, 534 (5th Cir. 1949); *Maceri* v. *United States*, 342 F.Supp. 505, 506 (E.D. Mich. 1972); *Faubion* v. *United States*, 424 F.2d 437, 438-439 (10th Cir. 1970); *Peters* v. *Felber*, 66 Cal.App. 2d Supp. 1011 (1944); *United States* v. *Smalldone*, 485 F.2d 1333, 1344 (10th Cir. 1973); *Sullivan* v. *Day*, 372 F.Supp. 359, 360 (E.D. Ky. 1974). An interesting case which will resolve a conflict among the circuits as to the application of 1 U.S.C. § 109 to the mandatory penalties for narcotic offenders under 26 U.S.C. § 7237(d), in light of newly enacted eligibility for parole under 18 U.S.C. § 4204, is presented in *Warden, Lewisburg Penitentiary* v. *Marrero*, cert. granted 414 U.S. 1128 (1974), USSC No. 73-831.

ing goal is to liberate the entire economy so that it will grow and adapt free of controls or the threat of controls."

President Ford, assuming office a short time later, stated on August 28, 1974, in a nationally televised press conference:

"Controls are out, period."

Secretary of the Treasury William Simon [15], attending the California Conference on Inflation with California Governor Ronald Reagan, stated on Wednesday, October 23, 1974:

"America has more government than most people want, and we most certainly have more government than we're willing to pay for. . . . freedom is not only precious for the American people, it's also efficient, and it's proven to be the most efficient thing in this free enterprise system that has given the American people the greatest prosperity that the world has ever known. And let us not forget that, because *if we go back to controls one more time, God help us. I lived through the closing phase of the last one—the inefficiencies,*

[15] By Section 2 of Executive Order No. 11788 (June 20, 1974), the orderly termination of economic controls have been delegated to the Secretary of the Treasury. There is no longer a "Cost of Living Council" but rather a Council on Wage and Price Stability which merely has the authority to monitor wages and salaries, not to limit them. Pub. L. 93-387, 88 Stats. 750.

the distortions, the inequities, and the ultimate inflation that follows at the end. You're postponing it. Controls are nothing but a copout." (Emphasis added.)

The leaders of the national administration have thus agreed, publicly at least, that a bureaucracy, such as the Cost of Living Council, is no match for the free market in the allocation of human and material resources for the common good.[16]

CONCLUSION

Thirty years of judicial precedent supports the Court's decision relative to the expiration clause, and its exceptions, contained in section 218 of the Eco-

[16] The primary thrust of the Petition is nevertheless addressed to the contention that the decision in issue will "add substantially to current inflationary pressures", will "encourage others to challenge the many limitations on wage increases that the Council imposed", and will "merely defer the effects of inflationary sums" earned during the existence of the Economic Stabilization Act of 1970 (Petition, pages 7–10). These fears conjured by petitioner were considered by Congress when it failed to renew the Act, leaving the economy free of federal intervention, and leaving to the judiciary a clear intent that the Council's "*authority to issue and enforce* orders and regulations expires at midnight April 30, 1974. . . ." That prerogative of Congress should not be disturbed, irrespective of what petitioner may deem from a standpoint of economic policy to be inexpedient or unwise. *Maryland* v. *Wirtz*, 392 U.S. 183, 194, fn. 22 (1967).

nomic Stabilization Act of 1970. Thus, petitioner has abandoned its former reliance on such precedent and now urges an antiseptic analysis of section 218 without regard to prior control acts. The argument must fail.

The facts are undisputed. California has not violated, by "escrow" or otherwise, the Council's August 1973 Decision and Order. Petitioner United States has to this point freely admitted to such compliance. In the absence of a pre-expiration violation, by operation of law the District Court was without subject matter jurisdiction to issue a preliminary injunction against the State of California.

This Honorable Court can, with one stroke, implement the intent of Congress and honor the clear and consistent decisions of this Court and former Emergency Courts of Appeal set out here and in the opinion below.

The Court should Order that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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January 1975

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